



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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March 14, 2012

Ms. Laura Nirenberg
4988 W 150 North
LaPorte, Indiana 46350

Re: Formal Complaint 12-FC-65; Alleged Violation of the Access to Public Records Act by the Indiana Department of Natural Resources

Dear Mr. Nirenberg:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Natural Resources ("DNR") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Cameron Clark, Chief Legal Counsel, responded on behalf of the DNR. His response is enclosed for your reference. I have granted your request priority status pursuant to 62 Indiana Administrative Code 1-1-3(3).

BACKGROUND

In your formal complaint, you allege that the DNR failed to provide the balance due for copies and postage for the records that you had requested. You thereafter submitted a check to the DNR that accounted for the anticipated copy fees and postage. Upon receipt of your check, the DNR informed you that the check that you provided contained an incorrect amount; your check was \$6.66 more than the balance due. You allege that the DNR will not process your request until you submit a check for the appropriate amount or donate the overage to programs overseen by the agency. You also have noted that the actual figure provided by DNR for the copies has already been changed, so had you been able to estimate the exact amount for postage, the amount submitted would have still been inaccurate and caused further delay.

In response to your formal complaint, Mr. Clark advised that you have not been denied access to the public records that you have been requested. Since the filing of your formal complaint with the Public Access Counselor's Office, DNR has received the correct payment from you for the records that were sought and has sent you a package containing 231 documents. Your complaint is based on a lack of understanding of the logistics involved in responding to a request and your own hastiness in sending a check for a random amount to the DNR. On January 8, 2012, the DNR received your initial public records request, which was subsequently amended on two separate occasions. Approximately fifty DNR employees were involved in some capacity in gathering all

records that were responsive to your request. In an attempt to be thorough yet respond timely to your request, DNR was unable to provide a final cost figure until the agency was certain that the search for records that would be responsive to your request had been exhausted.

On March 1, 2012, you received notification via email that the records that were requested were available and advised of your options. A total cost could not be determined until DNR became aware whether you desired all, some, or none of the documents, whether you wanted to inspect the records or be provided copies, and whether you wanted DNR to mail the records to you. You responded to the e-mail from DNR on March 1, 2012, and advised that you wanted all copies and asked for a total cost, plus postage. At the time you responded to the March 1, 2012 e-mail, Phil Bloom, DNR Director of Public Information and the representative working with you in your request, had already left the office on business travel. Mr. Bloom at that point knew he would be out of the office for a training workshop on Friday, March 2, 2012, and his intent was to complete your request on Monday, March 5, 2012.

On March 2, 2012, you sent an e-mail to Mr. Bloom, notifying him that you were sending a check for \$35.00 and asked that any leftover be refunded to you or put on your account for future use. Before even responding to your e-mail, Mr. Bloom needed to clarify if you were allowed to “run a tab” with the agency for copying fees. Mr. Bloom was unable to make such an inquiry on March 2, 2012, as he was out of the office for a training workshop.

On March 2, 2012, a series of tornadoes hit southern Indiana. As a result, Mr. Bloom was summoned back to Indianapolis to work with the Department of Homeland Security’s Joint Information Center. Mr. Bloom helped arrange and fulfill staffing needs at the Information Center through Monday, March 5, 2012. On March 5, 2012, the DNR received your unsolicited check for \$35.00. At the same time, a check was performed on the page count of the records that you requested and an error was discovered; three pages were listed inadvertently in two places, as such this reduced the initial cost that was first communicated to you. On March 6, 2012, a DNR employee was assigned the task of copying the records. By the time the copies were made, recounted, and confirmed, it was too late to inquire with Pitney-Bowes the exact cost for the postage. On March 7, 2012, Mr. Bloom was out of the office assisting a media event near Turkey Run State Park that involved the Governor. On March 8, 2012, Mr. Bloom e-mailed you and advised you of the changes, the exact cost, and that you would not be able to “run a tab” with the agency for your copying fees. Upon receiving your check for the proper amount, all documents were sent to you via the U.S. Postal Service on March 12, 2012.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See* I.C. § 5-14-3-1. The DNR is a public agency for the purposes of the APRA. *See* I.C.

§ 5-14-3-2. Accordingly, any person has the right to inspect and copy the DNR's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

The APRA permits a public agency to charge a fee for copies of public records. *See* I.C. § 5-14-3-8. Public agencies may require a person to pay the copying fee in advance. *See* I.C. § 5-14-3-8(e). Nothing in the APRA requires that a public agency waive a copying fee. *See Opinion of the Public Access Counselor 07-FC-124*. This Office has stated that it is reasonable for public agencies to send copies of records to the requester via the U.S. Postal Service where the requester has paid for the applicable postage costs in advance. *See Opinion of the Public Access Counselor 09-FC-13 and 09-FC-221*.

The APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances of the request. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*.

From what has been provided, it is my opinion that the DNR has complied with the requirements of the APRA in responding to your request for copying fees and postage in a reasonable period of time and in regards to the actual fees that were charged. On March 1, 2012, you inquired with the DNR as to the total cost for the records, including postage. On March 8, 2012, you submitted a further inquiry regarding the issue. In that same time period, you submitted to the DNR an unsolicited check for \$35.00. On March 8, 2012, the DNR responded to your inquiries and provided that it had been delayed in responding to you as the DNR was assisting the Department of Homeland Security with establishing an information center in regards to the tornados that had occurred in southern Indiana. The DNR provided to you the total cost for the records was \$28.34 and that it received your check for \$35. To remedy the situation, the DNR *suggested* that you could send a new check or donate the difference between the actual cost and the amount of your check to a DNR charity fund (emphasis added). The DNR stated that it was unable to "run a tab" for any future records request with the balance from the money that was sent, as you had requested. During the interim period since you have filed your formal complaint, the DNR has received your check for the appropriate amount and sent to you via the U.S. Postal Service all records that were responsive to your request; which I trust

is in satisfaction of your complaint. In light of the circumstances, it is my opinion that the DNR responded to your e-mail inquiries regarding fees in a reasonable period of time and complied with the fee requirements imposed by I.C. § 5-14-3-8.

CONCLUSION

For the foregoing reasons, it is my opinion the DNR did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Cameron F. Clark